

STATE OF MICHIGAN
COURT OF APPEALS

SAMI M. ALAOUIE,

Plaintiff-Appellant,

v

DAVIS TOOL & ENGINEERING CO. and
MICHIGAN TOOLING ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED

November 21, 2000

No. 223048

WCAC

LC No. 98-000347

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the September 28, 1999, order of the Worker's Compensation Appellate Commission (WCAC), which affirmed the magistrate's decision denying his claim for differential benefits. We reverse and remand for reconsideration.

I

Plaintiff began working for defendant Davis Tool in 1986 as an assembler. He testified that prior to his employment he had no hand or wrist problems. He testified that his work required rapid and repetitive hand and wrist action, and that he generally worked 50-60 hours per week.

Plaintiff testified that he began experiencing pain in his left wrist in June 1994 and first consulted with Dr. Bhagat on June 30 of that year. Plaintiff was placed on restricted work, requiring use of the right hand/wrist only and limited to 40 hours per week. Dr. Bhagat diagnosed a ganglion cyst and removed it in November 1994. Plaintiff was paid weekly worker's compensation wage loss benefits until he returned to restricted work in January 1995. Additional surgery was required in June 1995 because scar tissue from the first operation was restricting the tendons in the wrist. Once again weekly wage loss benefits were paid voluntarily. Plaintiff returned to restricted work on July 31, 1995. In October 1997 he transferred to another position, at which time his wages returned to or exceeded the pre-injury level.

Plaintiff filed a petition seeking differential benefits, i.e., the difference between plaintiff's pre- and post-injury wages. Plaintiff's expert, Dr. Bhagat, testified that plaintiff suffers from arthritis in the wrist as a result of a wrist fracture in the past, but opined that the

ganglion cyst was at least aggravated by plaintiff's employment. However, defendants' expert, Dr. Krieg, opined that the cyst was not work-related, and testified that any cyst would more likely than not be caused by some traumatic injury. In an opinion and order mailed June 2, 1998, the magistrate denied the petition for benefits. The magistrate based his decision at least in part on Dr. Bhagat's statement during cross-examination that "it's more likely to be not work-related than work-related." The magistrate concluded:

When reviewing the matter, plaintiff testified that his repetitive bending, twisting, pulling and carrying of various parts while in the employ of Davis Tool caused or aggravated his condition more specifically a ganglion cyst. It is important to note that plaintiff had previous traumatic injuries to the left wrist including a fracture. Plaintiff had a pre-existing arthritic condition which was attributed directly to the previous fracture. When considering plaintiff's case as a whole and the medical findings of Dr. Bhagat, *and the doctor's own admission that it is more likely than not that the ganglion cyst which caused plaintiff's partial disability, was not work-related*, causes the plaintiff's case in chief to fail. [Emphasis added.]

Plaintiff appealed, arguing that the magistrate's decision is based on a finding at odds with the record, in that Dr. Bhagat never opined that plaintiff's cyst was not work-related, but rather admitted that generally such cysts are not work-related. In an opinion and order dated September 28, 1999, the WCAC affirmed. Although agreeing that there is substantial evidence to support plaintiff's claim for benefits, the WCAC held that substantial evidence also supports the magistrate's finding that the cyst is not work-related.

Our review of the record indicates that it supports a finding that the plaintiff's injuries predated his employment by many years and the problems of these cysts were the result of these old injuries. We have no problem with the magistrate's utilization of the comments of Dr. Bhagat while making the broader holding that plaintiff had failed to meet his burden of demonstrating either that his employment caused or *aggravated* his cyst problem. The magistrate certainly understood the latter aspect of plaintiff's claim, explicitly identifying it, as quoted above. The magistrate clearly utilized the broad record, and in particular plaintiff's multiple physical problems, to conclude that there was no *aggravation*. The particular opinion of Dr. Bhagat referenced by the magistrate forms part of the foundation, not the sole basis, for the aggravation holding. The magistrate was clearly trying to emphasize the overall speculative nature of plaintiff's claim.

This Court granted plaintiff's application for leave to appeal.

II

Plaintiff argues that the WCAC should have reversed and remanded to the magistrate because the magistrate misunderstood the testimony of treating physician Dr. Bhagat. Plaintiff also argues that he is entitled to differential benefits based on lost overtime. Defendants respond that the WCAC properly affirmed the magistrate, and that if this Court disagrees, the question

whether plaintiff is entitled to any additional benefits must be addressed in the first instance by the magistrate and WCAC.

As the magistrate noted, Dr. Bhagat testified that in his opinion plaintiff's wrist problems in 1994 and the surgery performed in 1994 were related, and were "probably caused by his work." On cross-examination the following colloquy occurred:

Q. Isn't it true that ganglion cysts are not work related or not caused by employment?

A. Not necessarily. I mean all ganglions are not work related. At the same time every ganglion is not—some, yes, if you have repeated, you know, flexion accidents, some type of stresses, people have reported that, but it's very hard to be 100 percent sure.

Q. In fact, it's probably—as a ganglion cyst it wouldn't be related to employment, it's probably rare as—let me rephrase that.

It's probably more rare for a ganglion cyst to be work-related as opposed to something else?

A. Well, to put it a better way, *it's more likely to be not work related than work related*. [Emphasis added.]

Plaintiff argues that the magistrate took the italicized phrase out of context and relied on it in denying benefits. Plaintiff contends that Dr. Bhagat did not admit that it was more likely than not that plaintiff's cyst was not work-related, but rather admitted that most cysts are not work-related. Defendants note that immediately after this colloquy Dr. Bhagat admitted that he did not know when the cyst developed. Defendants argue that the WCAC properly affirmed because Dr. Bhagat's earlier testimony that the cyst was at least aggravated by work is speculative.

We agree with plaintiff that the magistrate mischaracterized Dr. Bhagat's testimony when he found that Dr. Bhagat admitted that "it is more likely than not that the ganglion cyst . . . was not work-related." The doctor admitted only that most ganglion cysts are not work-related. He never retracted his opinion that in plaintiff's case the cyst was at least aggravated by plaintiff's work. Although Dr. Bhagat admitted that he did not know precisely when the cyst developed, that does not necessarily render his opinion that the cyst was work-related speculative. Because the magistrate clearly relied on the mischaracterized testimony in denying benefits, and because the WCAC agreed that there is substantial evidence to support an award of benefits, we cannot conclude that the magistrate's error was harmless. Moreover, it is unclear from the WCAC's opinion whether it found that substantial evidence supports the magistrate's decision *despite* the error, or whether it found no error contrary to our present holding.

We therefore reverse the decision of the WCAC and remand for reconsideration of plaintiff's appeal from the magistrate's decision. On remand the WCAC shall make any necessary supplemental findings of fact, unless it finds that the record is insufficient or that it

would be forced to speculate. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). As defendants note, the questions whether plaintiff is otherwise entitled to differential benefits and in what amount have not been addressed below, and so are not properly before this Court at this time. On remand the WCAC shall address these issues if it finds that plaintiff has demonstrated a work-related injury.

Reversed and remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ David H. Sawyer